IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 386

FEDERAL POWER COMMISSION, *Petitioner,*

vs.

TEXACO INC. AND PAN AMERICAN PETROLEUM CORPORATION, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PAN AMERICAN PETROLEUM CORPORATION IN OPPOSITION.

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Respondent, Pan American Petroleum Corporation, Petitioner in Case No. 7303 below, hereby submits its Brief in response to the Petition for Writ of Certiorari.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A of Petition) is reported at 317 F. 2d 796.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Pursuant to claim of authority under Sections 4, 5, 7 and 16 of the Natural Gas Act, the Commission issued rulemaking Order No. 242 requiring summary rejection of producer rate filings and certificate applications without hearings or findings under Section 4, 5 or 7 of the Act where the underlying sales contract contains flexible price changing provisions. As required by Order No. 242, the Commission summarily rejected and denied Pan American's January 16, 1963, certificate application in Docket No. CI63-867 solely because the underlying sales contract provides for redetermination of the contract price effective after September 30, 1983. The result is that:

1. Pan American's contract rates effective after September 30, 1983, are disallowed without hearings and findings respecting whether they are just and reasonable,

2. Pan American's certificate application is denied without a hearing and findings of public convenience and necessity, and

3. Pan American is hereafter barred from showing before the Commission or the Courts that its post-September 30, 1983, contract rates are just and reasonable and is barred from now showing that its contract sale is required by the public convenience and necessity.

The issue below and the question here presented is: Whether the Constitution,[1] the Natural Gas Act and the Administrative Procedure Act permit the Commission to by-pass the hearings, adjudications, substantive findings, and factual record required by Sections 4(e), 5(a) and 7(c) and (e) of the Natural Gas Act in making substantive rate and certificate decisions.

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[1] The Court below did not reach any of the Constitutional issues presented, because it did not find it necessary to reach the issues presented by Commission reliance on the substantive decision in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956).

STATUTES INVOLVED

The statutory provisions involved are Sections 4(c), (d) and (e); 5(a), 7(c) and (e), 16 and 19(b) of the Natural Gas Act, 52 Stat. 822 and 823 (1938), 56 Stat. 83-84 (1942), and 52 Stat. 830, 831 (1938), 15 U.S.C. 717c(c), (d) and (e), 717d(a), 717f(c) and (e), 717o and 717r(b).

STATEMENT

With respect to Case No. 7303 below,[2] the Commission seeks review of the decision below reversing its February 19, 1963, summary rejection of the certificate application of Respondent, Pan American Petroleum Corporation, in Docket No. CI63-867, without a hearing or findings of public convenience and necessity (R. 51). The sole ground for rejection is that the underlying sales contract violates Order No. 242, 27 F.R. 1356, 27 FPC 339, amending Order No. 232-A, 26 F.R. 2850, 25 FPC 609, by providing that for each five-year period commencing October 1, 1983, the contract price is the market price as determined by the parties (R. 21-22).

On February 27, 1956, in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, this Court held that the Act "purports neither to grant nor to define the initial rate-setting powers of natural gas companies" but that it limits Commission authority to "review" of the rates fixed by natural gas companies. The proceedings which resulted in Order No. 242 were instituted by notice issued April 4, 1956, in Docket No. R-153, proposing summary rejection of initial rate schedule filings which are supported by producer sales contracts containing certain flexible change in price provisions. Except for comments filed in April and May of 1956, there were

[2] The Petition for Writ of Certiorari consolidates two separate cases below which were briefed and argued on different records. The record printed for use of the Court of Appeals in *Pan American Petroleum Corp.* v. *FPC*, Case No. 7303 below is at pages 3a-20a in the Appendix to the Petition for Review filed by Pan American. Nine copies thereof are being filed as permitted by Rule 21(4) of the Rules of this Court.

no further proceedings until March 3, 1961, when the Commission issued Order No. 232, 25 FPC 379, determining that all flexible change in price provisions in independent producer contracts *tendered for filing* on and after April 3, 1961, are *inoperative* and of *no effect at law*. By Order No. 232-A, 25 FPC 609, issued March 31, 1961, the Commission amended Order No. 232 to restrict its applicability to contracts *executed* on or after April 3, 1961.

In addition to the favored nation and spiral escalation provisions emphasized in the petition, Order No. 232 invalidated five-year price renegotiation and market price redetermination provisions such as the contract provision before the Court in the instant case. Concurrently with these rule-making proceedings, the Commission, as shown by its Annual Reports for fiscal 1956, 1957, 1958, 1959, and 1960, unsuccessfully requested that the Act be amended to eliminate favored nation and spiral escalation provisions from producer contracts. In its Annual Reports for fiscal 1961 and 1962, the Commission requests Congress to "Amend Section 7(c) to eliminate the mandatory hearing requirement."

By notice issued October 10, 1961, in Docket No. R-203, the Commission proposed amending Order No. 232-A to require *summary rejection* of producer rate schedules and certificate applications supported by contracts containing flexible change in price provisions. On February 8, 1962, the Commission issued Order No. 242, 27 FPC 339, which (1) requires *rejection of all producer rate schedules and applications for certificates of public convenience and necessity* supported by contracts executed on or after April 2, 1962, containing flexible change in price provisions, and (2) provides that, with respect to pipeline certificate applications, *such contracts will not be considered in support of the pipeline company's gas supply*. Pan American duly filed its application for rehearing and, upon denial thereof, it duly filed its petition for judicial review of Order No. 242. The Commission success-

fully moved to dismiss asserting that Order No. 242 is not *directly* reviewable, *Pan American Petroleum Corp.* v. *FPC*, Case No. 387, October Term, 1963, pending.

On January 16, 1963, Pan American filed under Section 7(c) of the Act its certificate application in Docket No. CI63-867 (R. 2-50) covering its sale of gas to Colorado Interstate Gas Company for transportation and resale in Colorado Interstate's proposed Wind River Basin pipeline, Docket No. CP63-206. On February 19, 1963, the Commission rejected and returned Pan American's certificate application because the October 4, 1962, contract with Colorado Interstate violates Orders No. 232, 232-A and 242 by providing for redetermination of the price effective after September 30, 1983 (R. 51). On March 4, 1963, Pan American filed its application for rehearing (R. 53-63), and on March 6, 1963, its application for rehearing was denied (R. 64-65). Thereafter on March 8, 1963, Pan American filed its petiion for review in *Pan American Petroleum Corp.* v. *FPC*, Case No. 7303, 10th Circuit.

The Court of Appeals held that Order No. 242 is invalid and void under Section 16 of the Act because it is contrary to and in violation of the hearing and review on a factual record regulatory scheme prescribed in Sections 4, 5 and 7 of the Act. The Court held that the Commission does not have authority to legislate in what it conceives to be the public interest, but that it is entirely a creature of the Natural Gas Act, and the determining question is what the Act allows. Cf. *FPC* v. *Panhandle Eastern Pipe Line Co., et al.*, 337 U.S. 498 (1949); *FCC* v. *American Broadcasting Co., Inc.*, 347 U.S. 284 (1954).

Respecting the Commission's argument, the Court of Appeals stated:[3]

> "Section 16 of the Act empowers the Commission to make rules and regulations to carry out the provisions of

[3] Footnotes and footnote references are omitted from all quotations herein.

the Act but that section is not a source of power to regulate in conflict with substantive provisions of the Act. The Commission asserts that the necessary authority flows from §§ 4, 5 and 7." 317 F. 2d 805.

With respect to the scope of judicial review the Court of Appeals held:

> "Our difficulty is immediately apparent. The summary rejection of the Texaco and Pan American contracts without a hearing deprives the court of any record upon which the rejection may be sustained, other than the general orders which are attacked. As we have noted above, the Commission has successfully maintained that these general orders are not subject to direct court review. This bootstrap operation of the Commission, in practical effect, circumvents court review of the basic question — the propriety of indefinite price-changing clauses." 317 F. 2d 804-805.

With respect to the legal and factual arguments advanced by the Commission, the Court of Appeals held:

> "These findings are not made in the language of the statutory standards of 'just and reasonable' and 'public convenience and necessity.' The public interest must be related to and tested by these standards. Although the Commission is the guardian of the public interest in the administration of the Act, *the Commission may not substitute its standards for the statutory standards.* Additionally, if we should accept the legal sufficiency of the Commission's findings, we have no way of determining the factual basis for those findings because we have before us no record of facts to sustain them." 317 F. 2d 806 (Emphasis supplied).

In *Pan American Petroleum Corp.* v. *FPC*, Case No. 387, October Term, 1963, Pan American seeks review of the decision below that Order No. 242 is not *directly reviewable.* It is respectfully submitted that consideration of the Petition for Writ

of Certiorari in the instant cases will be facilitated if it and the Petition in Case No. 387 are considered together.

ARGUMENT

1. Statement of Pan American's Position.

Pan American's position is that the Court below should have reviewed Order No. 242 in Case No. 7002 below, companion case No. 387 now pending in this Court, where review would have been on the record in the rulemaking proceeding. Because the Court below found that Order No. 242 did not satisfy the threshold test of consistency with Sections 4, 5, 7 and 16 of the Act, it did not reach the issue of factual support for the findings advanced by the Commission in support of Order No. 242 and was not hampered by the Commission failure to certify in the instant cases the record in the rulemaking proceedings. However, as noted on page 2 of the Supplemental Memorandum of Petitioner, the Court of Appeals for the 9th Circuit reviewed the factual findings advanced by the Commission even though the Commission did not certify to the 9th Circuit a factual rulemaking record purportedly supporting such findings.

As is shown on pages 15 and 16 of the Petition in companion Case No. 387 pending in this Court, the apparent intercircuit conflict advanced by the Commission is a direct result of the erroneous decision of the Court below respecting *direct review* of Order No. 242. Pan American recognizes that an intercircuit conflict supports granting the Commission's petition, but respectfully submits that, as shown in the Petition in Case No. 387, this apparent intercircuit conflict is a direct result of Commission insistence on indirect review of Order No. 242 without the Order No. 242 record.

The result in the instant cases is that, if this Court finds it necessary to resolve this apparent intercircuit conflict, it can do so with respect to the threshold issue, whether Order No. 242 is

consistent with Sections 4, 5, 7 and 16 of the Act, but, because the record in the rulemaking proceedings is not before it in the instant cases and was not before the 9th Circuit in the *Superior* Case, this Court cannot reach the issues of reasonableness and arbitrary action.

2. The Commission's Petition and Supplemental Memorandum are Based on Erroneous Assumptions.

The Commission bases its case upon two assumptions: (1) that the decisions cited by Pan American in its Petition in companion Case No. 387 pending in this Court are not applicable to *direct* review of Order No. 242, and (2) that some of these same decisions authorize it (a) to bypass and modify the substantive provisions of the Natural Gas Act as interpreted by this Court in *Mobile*, and *Memphis*,[4] and (b) to issue substantive rules without making a factual record in support of the findings recited as the basis for such rules. Neither of these assumptions is correct. The error of the first assumption is adequately demonstrated in Pan American's Petition in companion Case No. 387. The errors in the second assumption will be hereinafter demonstrated.

This case does not present a fundamental question as to the scope of the Commission powers under Section 16 of the Act.[5] That issue was resolved in *FPC* v. *Panhandle Eastern Pipe Line Co., et al.*, 337 U.S. 498 (1949), when the Court rejected the Commission argument that Section 16 is a source of authority to bypass or modify substantive provisions of the Act. In the instant cases, the Court of Appeals merely held that Order No. 242 conflicts with the substantive regulatory scheme prescribed in the

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[4] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Div.*, 358 U.S. 103 (1958).

[5] The Administrative Procedure Act does not enlarge the Commission's substantive powers or rulemaking authority.

Act as interpreted by this Court in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Div.*, 358 U.S. 103 (1958).

The doctrine of *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), and *FCC* v. *American Broadcasting Co., Inc.*, 347 U.S. 284 (1954), that rulemaking decisions must conform to the delegation of substantive authority in the basic statute and have a reasonable basis in fact is applicable to this case.[4] However, the affirmance of the FCC regulation in the *Storer* case and the invalidation of the FCC regulation in the *American* case are not applicable to whether Order No. 242 conforms with the delegation of authority in the Natural Gas Act. The substantive regulatory standards applicable to regulation of broadcasting are vastly different from those applicable to regulation of prices for natural gas. One essential difference is that the Natural Gas Act regulates the price of a privately owned commodity protected by the full limitations of Fifth Amendment due process. The Communications Act provides for licensing limited use of the public domain, the carriers of radio frequencies, and is based upon entirely different Constitutional and statutory concepts than regulation of natural gas prices. Obviously, decisions applicable to licensing use of the public domain cannot be validly cited as the upper limit of rulemaking authority applicable to regulation of the price for private property. This distinction is particularly relevant to the Constitutional and statutory requirement of a hearing, factual record, and substantive findings present in the instant cases, *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944),

[4] In interrelated case, *Pan American Petroleum Corp.* v. *FPC*, Case No. 387 pending in this Court, the Commission argues that these decisions of this Court respecting the criteria for determining parties aggrieved and reviewability of orders are not applicable to determine whether Order No. 242 is *directly* reviewable. In the instant case it argues that the substantive decisions in these cases are applicable to whether Order No. 242 is invalid. Each of these arguments by the Commission is without foundation in law or reason.

but absent in *Storer*, 302 U.S. 192, 202.[7] A further distinction is that, contrary to the instant cases,[8] the *Storer Broadcasting* and *American Broadcasting* cases constituted *direct* review of regula-

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[7] In its Annual Reports for fiscal 1961 and 1962, the Commission requests that Section 7(c) of the Natural Gas Act be amended by eliminating "the mandatory hearing requirement" and substituting therefor "notice and opportunity for hearing" to relieve the Commission from holding hearings where no useful purpose is served.

In its August 26, 1963, decision in *Superior Oil Co.* v. *FPC*, Case No. 18252 (unreported), the Court of Appeals for the 9th Circuit rejected this basic distinction between the Communications Act as interpreted in *Storer* and this Court's interpretation of the Natural Gas Act in *Mobile* and *Memphis*, infra. Its conclusion that substantive decisions in the form of rulemaking orders need not be supported by a factual record is contrary to this Court's decision in the *Storer case*.

The purported remedy under Section 1.7(b) of the Commission Regulations, 18 CFR Section 1.7(b), is illusory with respect to Order No. 242. As the Commission recognizes in its Petition for Writ of Certiorari in *FPC* v. *H. L. Hunt, et al.*, Case No. 273, October Term, 1963, producers cannot keep gas fields shut in indefinitely pending certification of the sale. Since the primary purpose of Order No. 242 is to avoid hearings and evidentiary findings, the Commission will not allow Section 1.7(b) of its Regulations to be interpreted as providing for "evidentiary hearings" here. This is well illustrated by the proceedings in *Atlantic Refining Co.*, Docket No. C162-1562, to which reference is made on page 14 of the Petition. There the Examiner excluded all factual evidence respecting economic justification for the Memphis type provision in Atlantic's contract. The Examiner ruled that the only issue was one of law. The Commission has not rendered its decision.

[8] The Commission did not certify a factual record showing whether Respondent's price redetermination provision is inconsistent with regulatory standards prescribed in the Act or unnecessary or inappropriate to carrying out the regulatory scheme prescribed in the Act. One pipeline company, El Paso Natural Gas Company, has created numerous controversies respecting the favored-nation provisions in its contracts. However, this fact, which is not shown in the record below, does not sustain rejection of all flexible price changing clause contracts with all interstate gas pipeline purchasers.

The Commission attempts to overcome the absence of a factual record by citing its decision in *Re The Pure Oil Co.*, 25 FPC 383, Opinion No. 341, issued March 3, 1961. Respondents were not parties to that proceeding, and the Court of Appeals did not have the *Pure* record before it in the instant case. Commission policy prohibits certification of the *Pure* case record to the Court in the instant cases (App. 1a).

tions and the Court had before it the factual record upon which the regulations were based.

The Commission's third argument is that invalidation of Order No. 242 will frustrate its regulation of producer prices. With the area rate method of regulation, most, if not all, of the difficulties cited by the Commission in its Order No. 242 have evaporated or will evaporate. The decision of the Court of Appeals has no effect upon the issuance of Commission policy statements.

> "We are deciding only the cases before us. The problems of area pricing are not presented here. In our opinion Order No. 242 is void and without effect. Orders Nos. 232 and 232-A are in a different category. As advisory declarations of Commission policy they determine no rights." 317 F. 2d 807.

The Court of Appeals did not "emasculate the Commission's power to use its rulemaking authority for the formation of general legal and policy standards" with respect to "problems which are industry-wide in character and show little, if any, variation from case to case." It did, however, state that the Commission had not certified a factual record from which the Court could determine whether the economic justifications for rates filed pursuant to different kinds of flexible price changing provisions "show little, if any, variation from case to case."

3. The Question Presented in This Case Has Been Decided by This Court.

In *Willmut Gas & Oil Co.* v. *FPC*, 294 F. 2d 245, 250, (D.C. Cir. 1961), cert. den. 368 U.S. 975, the Commission successfully argued that the interpretation of the Act by this Court in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958), prohibits substantive rulemaking in the nature of Orders Nos. 232, 232-A, and 242.

In *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, supra, this Court held:

> "These sections [Sec. 4(d), 4(e), and 5(a) of the Act] are simply parts of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all *rates* are subject to being modified by the Commission upon a finding that they are unlawful. *The Act merely defines the review powers of the Commission and imposes such duties on natural gas companies as are necessary to effectuate those powers; it purports neither to grant nor to define the initial rate-setting powers of natural gas companies.*" 350 U.S. 341 (Emphasis supplied).
>
> "In short, the Act provides no 'procedure' either for making or changing rates; it provides only for *notice* to the Commission of the rates established by natural gas companies and for *review* by the Commission of those rates. The initial rate-making and rate-changing powers of natural gas companies remain *undefined and unaffected by the Act.*" 350 U.S. 343 (Emphasis supplied).

In *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958), this Court sustained the argument that flexible price changing clauses in natural gas company sales contracts are necessary, proper and desirable under the Act. The Court again interpreted the rate regulatory provisions of the Act as follows:

> "United, like the seller of an unregulated commodity, has the right in the first instance to change its rates as it will, unless it has undertaken by contract not to do so. The Act comes into play as to rate changes only in (1) imposing upon the seller the procedural requirement of filing timely notice of change, (2) giving the Commission authority to review such changes, and (3) authorizing the Commission,

in the case of rates for sales of gas for other than exclusively industrial use, to suspend the new rates for a five-month period and thereafter to require the posting of a refund bond pending a determination of the lawfulness of the rates as changed." 358 U.S. 113.

In *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137 (1960), the Court held that the Commission could not in 1961 regulate producer contractual provisions by making final determinations of rights under contractual provisions that would not come into operation until 1983. In *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944), and *FPC* v. *Panhandle Eastern Pipe Line Co.*, et al., 337 U.S. 498 (1949), this Court held that the Commission does not have the power to legislate interstitially so as to relieve it from performance of its obligations under the regulatory scheme prescribed in the Act. This holding was subsequently confirmed in *Atlantic Refining Co.* v. *Public Service Comm.*, 360 U.S. 378 (1959), in which the Court held that the Commission cannot substitute expediency and its conception of the public interest for the requirements of a hearing and findings applying record facts to the substantive regulatory standards prescribed in Section 7(e) of the Act.

These decisions make it clear that, in attempting to write the price changing provisions in Pan American's contract with Colorado Interstate, the Commission has attempted to rewrite the Act to disallow Pan American's rate filings and certificate application without the hearing and substantive findings required by Section 4(e) and 7(c) and (e) of the Act.[9] The issue is not whether the Court of Appeals decision emasculates Section 16 of the Act, but whether Order No. 242 emasculates Sections 4, 5 and 7 of the Act. The decision in the *Willmut* case, supra, that this Court has

[9] In its Annual Reports for fiscal 1956, 1957, 1958, 1959 and 1960, the Commission unsuccessfully requested that the Act be amended in this respect. In its Annual Reports for fiscal 1961 and 1962, the Commission asked Congress to "Amend Section 7(c) to eliminate the mandatory hearing requirement."

authoritatively decided the question presented in the petition is clearly correct.

4. The Decision of the Court of Appeals is Correct.

It is well settled that general regulations are invalid unless permitted under the Congressional delegation of substantive authority in the basic statute and consistent with the Administrative Procedure Act and due process of law.[9] If the regulation satisfies this threshold test, it is, nevertheless, invalid unless it has a reasonable basis in fact. As is shown on the preceding pages, Order No. 242 does not satisfy the threshold test of consistency with the substantive provisions of the Act.

The Court of Appeals held, and the Commission recognizes, that the findings advanced in support of Order No. 242 are not related to the substantive standards, "just and reasonable rates" and "public convenience and necessity," which Sections 4, 5 and 7 of the Act require the Commission to apply to rate schedule filings and certificate applications, "We find no statutory authorization for the Commission actions here attacked." Sections 4 and 5 state that "The controlling standard is what is just and reasonable . . . Section 7(e) states that the certificate will issue if the Commission finds that the proposed service 'is or will be required by the present or future public convenience and necessity'." 317 F. 2d 805.

In support of its petition the Commission now seems to argue that, under the Act, the "public interest" is one and the same thing with findings of "just and reasonable rates," under Section 4(e), and "public convenience and necessity" under Section 7(e). However, in the Court below the Commission argument was that, in disallowing rates and denying certificate applications, the "pub-

[9] FPC regulations, *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949); FCC regulations, *FCC* v. *American Broadcasting Co., Inc.*, 347 U.S. 284 (1954); ICC regulations, *East Texas Lines* v. *Frozen Food Express*, 351 U.S. 49 (1956); and CAB regulations, *CAB* v. *Delta Air Lines*, 367 U.S. 316 (1961).

lic interest" permits it to apply different substantive standards that are not as well defined as "just and reasonable rates" and "public convenience and necessity." The Court rejected this argument, "The public interest must be related to and tested by these standards." 317 F. 2d 806. It held that the Commission may proceed by issuing general regulations and policy statements where necessary or *appropriate to carry out the provisions of the Act.* Its holding that the Commission's attempt to "make contracts" for the sales of gas before it in the instant cases is without support in law or fact is clearly required by the decisions of this Court.

As is clear on the face thereof, the Commission factual arguments in support of Order No. 242 are not even remotely applicable to the contract provision before the Court in this case.[11] In addition, Commission argument that flexible change in price provisions are generally unnecessary and undesirable is refuted by the decision in *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division,* 358 U.S. 103 (1958).[12] Its argument that there is generally no economic justification for the prices prescribed in flexible price changing clauses is refuted by the decision in *Wisconsin, et al.* v. *FPC, et al.,* 373 U.S. 294 (1963). Similarly, the contention that the Commission is unable to make an adversary adjudication of the facts respecting the economic justification for flexible price changing provisions is refuted by the area rate proceedings pending in Docket Nos. AR61-1, et al., and AR61-2, et al., and by the recently instituted proceeding, *Sunray DX Oil Co., et al.,* Docket Nos. G-4281, et al., May 28, 1963.

In *Burlington Truck Lines, Inc., et al.* v. *United States, et al.,*

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[11]Pan American's contract provides that once every five years beginning October 1, 1983, the parties will determine the price that Pan American may file as a change in rate under Section 4(d) of the Act. As in the case with all contract prices and provisions, Pan American's contract prices and provisions are the product of negotiations with respect to known and anticipated economic and market conditions.

[12]The Court of Appeals for the Third Circuit reached essentially the same conclusions in *Shell Oil Co.* v. *FPC,* 292 F. 2d 149, 152 (1961), cert. den. 368 U.S. 915.

371 U.S. 156 (1962), and *Florida Lime and Avocado Growers, Inc., et al.* v. *Paul, et al.*, 373 U.S. 132 (1963), this Court held that argument of counsel and statements of reasons for issuing orders are not facts which support the issuance of orders and cannot be advanced as a substitute for record facts." The Court of Appeals was clearly correct in its statement that:

> "Additionally, if we should accept the legal sufficiency of the Commission's findings, we have no way of determining the factual basis for those findings because we have before us no record of facts to sustain them." 317 F. 2d 806.

Obviously, the Court of Appeals must have record facts upon which to sustain factual arguments made by Counsel, and the Commission's summary action in the instant case "precludes the possibility of any effective judicial review" of its factual and policy arguments."

The decision below that findings of expediency do not relieve the Commission from its statutory obligation to make a factual record showing the "reason why" in terms of the substantive standards prescribed in the Act is clearly correct: cf. *Atlantic Refining Co.* v. *Public Service Comm.*, 360 U.S. 378 (1959). This is true regardless of factual support or lack of factual

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[11]Regardless of the nature of the proceeding, Commission substantive decisions must be supported by record facts, *The Pure Oil Co.* v. *FPC*, 292 F. 2d 350 (7th Cir. 1961).

[12]The Commission argument that the Court of Appeals should have required it to certify a record showing the facts upon which it was making its arguments is clearly misleading. Aside from the fact that the obligation to furnish facts in support of its arguments is a Commission obligation, it would clearly be improper for the Court of Appeals to require certification of additional record materials after the briefs had been filed and the case argued. The parties are entitled to know the contents of the record upon which the case will be decided prior to making their final arguments. In Pan American's experience, attempts to obtain certification of additional items of record have been singularly unsuccessful. (App. 1a).

support for the Commission's findings of expediency.[12] The decision below that the Commission may not use summary procedures to "preclude the possibility of any effective judicial review" of Section 4(e), 5(a) and 7(e) substantive rate and certificate adjudications is similarly correct.

The reasoning of the Court below is in accord with well settled principles of public regulatory law. Its decision follows the decisions of this Court and the Court of Appeals interpreting the substantive provisions of the Act and the requirements of due process. The Court of Appeals decision does not directly or indirectly emasculate Commission authority to use rulemaking "for the formulation of general legal and policy standards." It merely holds that the particular legal and policy standards formulated by Order No. 242 are without support in the Act as interpreted in the *Mobile* and *Memphis* cases, supra, and are not supported by factual record. The requirements of support in a factual record and consistency with the Act as interpreted by this Court do not emasculate any legitimate exercise of authority.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that, unless the Petition in Case No. 387 is granted, the Petition in the instant cases should be denied. If the Petition in Case No. 387 is

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[12]The Commission has not cited any court decisions in support of its argument that it has authority to modify contractual pricing provisions as distinguished from disallowing contract rates as being unjust and unreasonable. At page 18 of the petition it states that the "true regulatory task" is "determining the just and reasonable rate."

Contrary to its assertion in the instant cases, the Commission in Case No. 7002 below, Case No. 387, pending in this Court, vigorously argued that Order No. 242 regulates the making of new contracts and does not modify existing (pre-April 2, 1963) contracts.

granted, Pan American would not oppose granting the Petition in the instant cases.

Respectfully submitted,

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APPENDIX

APPENDIX

Commission letter objecting to certification of Orders No. 232 and 232-A rulemaking record in Case No. 7002 below, Case No. 387 pending in this Court.

FEDERAL POWER COMMISSION
Washington 25, D.C.

Pan American Petroleum Corp. v. *F.P.C.* May 10, 1962
CA10 No. 7002

Honorable Robert B. Cartwright
Clerk, United States Court of Appeals
for the Tenth Circuit
Denver 2, Colorado

Dear Mr. Cartwright:

A motion to dismiss this case is now in preparation in this office and is expected to be filed shortly. As it appears unnecessary to undertake the preparation of a certification of the record, if the petition is dismissible on its face, we shall also ask for an enlargement of the time to file a certification until after disposition of the motion.

We note, however, that petitioner has filed a so-called "Initial Designation of Record," which purports to be submitted in accordance with Rule 34(8)(a) of the Court's rules. This rule applies where " * * * petitioner has, or has reasonable access to, a copy of the transcript * * *." As respondent has not yet certified the record, this rule is not applicable here. While we cannot speak with certainty until the Commission itself has certified what constitutes "the record on which the order complained of was entered" (Section 19(b); *cf. Norris & Hirschberg* v. *S.E.C.*, 163 F. 2d 689, 692, certiorari denied, 333 U.S. 867),

it seems evident that petitioner is in error in its effort to anticipate the contents of the record, since its "designation" includes items from Commission dockets in which orders were entered by the Commission which are not here sought to be reviewed.

In these circumstances, it is respectfully requested that no action be taken with regard to the printing of any parts of the record until the Commission certifies the record and the parties have made proper designations based on it.

Copies of this letter are being sent to all counsel simultaneously herewith.

Very truly yours,

/s/ Howard E. Wahrenbrock
Solicitor

cc: J. P. Hammond, Esquire
William H. Emerson, Esquire
William J. Grove, Esquire
Carroll L. Gilliam, Esquire